

NIH POLICY MANUAL

6033-2/26033-2 - STAY PROVISIONS FOR PROTESTS

Issuing Office: DAPE/OCM/OA 496-6014

Release Date: 11/15/96

1. **Explanation of Material Transmitted:** This Manual Chapter outlines the circumstances in which a contract may be awarded, notwithstanding a protest made by an interested party to the General Accounting Office or to the agency.

2. **Filing Instructions:**

Remove: DCG I&I 85-3 (Rev. 4), dated April 9, 1991

Insert: NIH Manual Chapter 6033-2/26033-2, dated 11/15/96

3. **Distribution:** NIH Mailing Keys F-401, F-404, F-407

PLEASE NOTE: For information on:

- content of this chapter, contact the Division of Acquisition Policy and Evaluation, OCM, OA, on (301) 496-6014.
- NIH Manual Mailing Keys, contact the Division of Support Services, ORS, on (301) 496-4808.
- NIH Manual System, contact the Division of Management Support, OMA, on (301) 496-2832.
- on-line information, use: <http://www3.od.nih.gov/oma/manualchapters/>

A. Purpose:

The purpose of this Manual Issuance is to provide guidance on implementing the "stay" provisions of the Competition in Contracting Act (CICA) of 1984 and the Federal Acquisition Streamlining Act (FASA) of 1994, which provide for suspension of award or performance while a protest is pending at the General Accounting Office (GAO) or with the agency.

B. Background:

1. The CICA allows an agency to award a contract while a protest filed directly with GAO is pending or to continue performance notwithstanding a protest when, in either situation, the Head of the Contracting Activity (HCA) makes a determination in support of the contracting officer's action.

The FASA and Executive Order 12979, Agency Procurement Protests, established

similar requirements for preaward and postaward stay provisions in the case of protests filed directly with the agency.

2. The FAR 33.103(f), Protests to the Agency, sets forth the circumstances when award may be made or contract performance continued notwithstanding a protest lodged with the agency. The FAR 33.104(b) and (c) sets forth the circumstances when award may be made or contract performance continued notwithstanding a protest lodged with the GAO. It includes protests filed after a debriefing required by FAR 15.505 or FAR 15.506.

3. Both GAO and agency stay provisions apply in instances when a protest is filed within ten calendar days after contract award or within five calendar days after a debriefing date offered and required by FAR 15.505 or FAR 15.506.

4. In accordance with HHSAR 333.104(b)(1) and (c)(2), the determination in B.1. above shall be executed by the Principal Official Responsible for Acquisition (PORA) and in the case of protests filed with the GAO, approved by the Deputy Assistant Secretary for Grants and Acquisition Management (DASGAM), OS, DHHS. For protests filed directly with the agency, the approving official is the PORA.

C. References:

1. Competition in Contracting Act (CICA) of 1984 - Public Law 98-369
2. Federal Acquisition Streamlining Act (FASA) of 1994 - Public Law 103-355
3. Executive Order 12979, Agency Procurement Protests, October 26, 1995
4. FAR 33.1, Protests
5. HHSAR 333.1, Protests
6. FAR 15.505, Preaward Debriefings of Offerors
7. FAR 15.506, Postaward Debriefings of Offerors
8. NIH Policy Manual [6033-1/26033-1](#), Contracting Officer's Statement of Facts and Circumstances in the Matter of a Protest

D. Procedures:

1. Written Determination and Findings (D&F)

In order to make a contract award or continue contract performance when a protest filed directly with the agency or GAO is pending, the Contracting Officer (CO) shall prepare and sign a written finding, setting forth the reasons why an award should be made or contract performance continued. The CO shall also prepare for the PORA's signature a written request for approval to make an award or continue performance. See Item 2.

below and [Appendix 1](#) for guidance regarding document routing and approval.

a. PROTESTS TO GAO

If the CO has determined that the criteria specified below applies, the CO shall prepare a D&F providing background information necessary to understand the acquisition, grounds of the protest, and a determination for the decision to proceed with award, or to continue contract performance notwithstanding the protest.

(1) Protests Before Award [See FAR 33.104(b)(i) and (ii)]

State in the determination the (a) urgent and compelling circumstances, which significantly affect the interest of the United States that will not permit awaiting the decision of GAO, and (b) that award is likely to occur within 30 calendar days of the written finding (this may be estimated from projected award dates or acquisition plan milestone dates). See [Appendix 2](#).

(2) Protests After Award [See FAR 33.104(c)(1) and (c)(2)(i) or (ii)]

In the case of a protest filed with the GAO after award, the determination must include a finding that: (a) contract performance will be in the best interests of the United States, or (b) urgent and compelling circumstances that significantly affect the interest of the United States will not permit waiting for the GAO's decision.

If the situation warrants a finding supportive of (a) above, list the reasons why continuation of performance is in the best interests of the United States. Provide a clear justification why a break in performance would be detrimental to the Government's best interests. Cite specifics, if possible. Provide a clear justification as to why these circumstances will not permit waiting for the decision of the GAO. The GAO will issue a protest decision within 100 calendar days. See [Appendix 3](#).

b. PROTESTS TO THE AGENCY

As in protests to the GAO, the CO must determine that circumstances warrant proceeding with award or continuation of performance, justifying such determination in writing and providing background information necessary to understand the acquisition.

(1) Protests Before Award [See FAR 33.103(f)]

State in the determination (a) urgent and compelling circumstances necessitating award, or (b) that award is in the best interests of the Government.

(2) Protests After Award [See FAR 33.103(f)(3)]

Continuation of performance must be justified by a written D&F on the basis of urgent and compelling reasons, or that such continuation would be in the best interest of the Government.

2. Routing and Approval of Written Determination

- a. The CICA allows an agency to make a contract award or continue performance provided that these determinations are authorized by the HCA. The HHSAR 333.104(b)(1) and (c)(2) grants this HCA determination to the PORA. This authority is not redelegable. In addition, the HHSAR requires that the Deputy Assistant Secretary for Grants and Acquisition Management (DASGAM), OS, DHHS, approve the written determination to make an award or continue performance.
- b. The Executive Order 12979, Agency Procurement Protests, which establishes policy on agency procurement protests, allows the CO to make a contract award or continue performance provided that the CO's determination is approved at a level above the CO. The DHHS procedures have vested this authority in the PORA. The CO's prepared and signed determination shall be routed through the ICD's Chief CO and the NIH Protest Control Officer (PCO) to the PORA for approval.
- c. In the case of GAO protests, a finding prepared and signed by the CO shall be routed through the ICD's Chief CO, the NIH PCO and the PORA. In cases of protests to the GAO, the CO shall also include a written request for approval (determination) to make an award or continue performance, to the DASGAM, OS, DHHS. This request will be signed by the PORA with an approval line for the DASGAM, OS, DHHS. These documents, consisting of an original plus one copy will be forwarded by the NIH PCO to the Department Protest Control Officer (DPCO) for approval by the DASGAM, OS, DHHS.
- d. If the request to make an award or continue performance notwithstanding the protest is approved by the DASGAM, the DPCO shall notify the GAO. Whether the request is approved or not, the DPCO shall telephonically notify the NIH PCO of the decision, who in turn shall immediately notify the CO.

If the request is approved, the CO can proceed with the award or continue with contract performance upon receipt of notification.

Records Retention and Disposal:

Records pertaining to NIH Manual Chapters are retained and disposed of under the authority of NIH Manual [1743](#), "Keeping and Destroying Records," Appendix 1, "NIH Records Control Schedule," Item 2600-A-4, Routine Procurement Files.

Appendix 1. Protest Review and Approval Route Slip:

CONTRACTING OFFICER
(IDENTIFY ORGANIZATIONAL AFFILIATION)

DATE

ADDRESS/PHONE

CONTRACTING OFFICER'S SUPERVISOR
(IDENTIFY ORGANIZATIONAL AFFILIATION)

DATE

ADDRESS/PHONE

CHIEF CONTRACTING OFFICER
(IDENTIFY ORGANIZATIONAL AFFILIATION)

DATE

ADDRESS/PHONE

ZAIGA E. TUMS
NIH PCO, DAPE, OCM

DATE

6100/6C01 496-6014

ADDRESS/PHONE

DIANE J. FRASIER
PRINCIPAL OFFICIAL RESPONSIBLE FOR
ACQUISITION AND DIRECTOR, OFFICE OF
CONTRACTS MANAGEMENT, OA

DATE

6100/6D01C 496-4422

ADDRESS/PHONE

FOR GAO PROTESTS INCLUDE

MICHAEL G. COLVIN
DHHS PCO, OCAM, OS

DATE

HHH/517D (202) 690-7887

ADDRESS/PHONE

TERRENCE J. TYCHAN DEPUTY ASSISTANT
SECRETARY FOR GRANTS AND ACQUISITION
MANAGEMENT, OS, DHHS

DATE

HHH/517D (202) 690-6901

ADDRESS/PHONE

Appendix 2. Protest Filed with the GAO Before Award:

DATE:

TO: Mr. Terrence J. Tychan

Deputy Assistant Secretary for Grants and Acquisition Management, OD, DHHS

FROM: Principal Official Responsible for Acquisition and Director, Office of Contracts
Management, OA, NIH

SUBJECT: Protest Before Award, (Name of Protester)

RFP _____

Entitled " _____ "

(GAO Protest No. B - _____)

I concur in the contracting officer's determination and findings (attached) to proceed with award of the subject RFP, notwithstanding the protest filed with the General Accounting Office (GAO). In accordance with FAR 33.104(b)(1)(i) and (ii), urgent and compelling circumstances, which significantly affect the interests of the United States will not permit awaiting the decision of the GAO. This acquisition is at the stage of final negotiations with contract award expected within 30 days of the contracting officer's written finding.

Delay in award would (e.g., ... seriously jeopardize the Institute's program, which is a major part of the National Institutes of Health's response to the National AIDS epidemic.)

Diane J. Frasier

Attachment

APPROVED:

Terrence J. Tychan
Deputy Assistant Secretary
for Grants and Acquisition
Management, OS, DHHS

Date

Appendix 3. Protest Filed with the GAO After Award:

DATE:

TO: Mr. Terrence J. Tychan

Deputy Assistant Secretary for Grants and Acquisition Management, OD, DHHS

FROM: Principal Official Responsible for Acquisition and Director, Office of Contracts

Management, OA, NIH

SUBJECT: Protest After Award, (Name of Protester)

RFP_____

Entitled "_____"

(GAO Protest No. B - _____)

I concur in the contracting officer's determination as stated in the attached Contracting Officer's Statement of Facts and Circumstances to continue with performance notwithstanding a protest filed with the General Accounting Office (GAO). In accordance with FAR 33.104(c)(1), (complete as applicable: (i) contract performance will be in the best interests of the United States; or (ii) urgent and compelling circumstances, etc.) The GAO notified the DHHS Protest Control Officer of (Name of Protester) protest on (Date), subsequent to the award of the contract to_____.

Example of basis for continuance of performance:

(Inherent to this requirement is the maintenance and inoculation of animals. Some of the animals have been used to produce antibodies for long periods of time and are irreplaceable. Any delays of this work would seriously compromise ongoing studies at the NIH and cause major disruptions in ongoing research programs.)

For the reasons stated herein and in the attachment supporting this memorandum, it is my recommendation that performance of this contract be permitted to continue.

Diane J. Frasier

Attachment

APPROVED:

Terrence J. Tychan
Deputy Assistant Secretary for
Grants and Acquisition Management, OS, DHHS

Date

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